IN THE SESSION COURT AT SHAH ALAM
IN THE STATE OF SELANGOR, MALAYSIA
[CIVIL SUIT NO.: BA-A52NCVC-117-03/2020]

BETWEEN

HORECA FOODS (M) SDN. BHD.
(NO. SYARIKAT: 807000-U) ... PLAINTIFF

AND

1. MUHAMMAD MAHFUZ MOHAMAD YASSIM
(NO. K/P: 850617-04-5411)

2. O&G TRANSPORT (KLANG) SDN BHD
(NO. SYARKAT: 1110470-U] ... DEFENDANTS

GROUNDS OF JUDGMENT
(FULL TRIAL)

A. INTRODUCTION

[1] This action is emanated from a claim for damages resulted from transportation of goods.

[2] Plaintiff is a company dealing with food products and the first Defendant is a lorry driver engaged by the Second Defendant, a transportation company.

[3] On 5 November 2019, Plaintiff had used the second Defendant's service to transport some Parmesan Cheese Powder from Shah Alam, Selangor to their factory customer named Julies Manufacturing Sdn Bhd in Alor Gajah, Malacca. The first Defendant after loading the food goods did not cover the goods with canvas and only did so in the midst of delivery when it

started to rain heavily. During the trip, the food items were placed together with some other chemical item as well.

[4] The first Defendant after picking the goods on 5.11.2019 at about 11am only delivered the goods to Julies Manufacturing Sdn Bhd the next day i.e 6.11.2019 at about 3pm. When the lorry reached its destination, upon inspection, Julies Manunufacturing Sdn Bhd rejected the goods as they found all pallets were wet and some water seeped onto the shrink wrap and affected several bags in all pallet (see **P5A**). Due to this, Julies Manufacturing Sdn Bhd placed all the pallets on hold and demanded the Plaintiff to investigate the issue and asked for corrective action before 18.11.2019. Julies Manufacturing Sdn Bhd later issued a supplier return note (**D19**) to return all 112 bags of the cheese powder to the Plaintiff.

[5] As a result, the Plaintiff had suffered loss and they initiated this action to sue the Defendant for negligence and breach of Guarantee terms.

[6] Plaintiff claimed the following in the Statement of Claim:

*(a) Jumlah Gantirugi Khas sebanyak **RM 119,491.06** dibayar oleh Defendan-Defendan kepada Plaintif;*

(b) Jumlah Gantirugi Am untuk ditaksirkan dan dibayar oleh Defendan-Defendan kepada Plaintif;

(c) Faedah sebanyak 5% ke atas Jumlah penghakiman bagi gantirugi khas dari tarikh 05.11.2019 sehingga tarikh penyelesaian penuh;

(d) Faedah ke atas sebanyak 5% ke atas Jumlah penghakiman bagi gantirugi am yang ditaksirkan mulai daripada tarikh pemfailan Saman ini sehingga tarikh penyelesaian penuh; dan

(e) Kos tindakan ini.

[7] After full trial, this court allowed Plaintiff's claim.

[8] Dissatisfied, the Defendant filed an appeal.

[9] The relevant cause papers filed and marked in this trial are:

DOKUMENTS	MARKING
Ikatan Pliding	**A**
Ikatan Dokumen Bersama	**B**
Ikatan Dokumen Tambahan Defendan	**C**
Fakta-Fakta Yang Dipersetujui	**D**
Isu-lsu Untuk Dibicarakan	**E**
Ringkasan Kes Plaintif	**F**
Ringkasan Kes Defendan	**G**

[10] The witnesses who had testified during the trial are as follows: -

Plaintiff's witnesses

SP1	Norlida Binti Zainal Abidin (Ida) Penolong – Bahagian Pentadbiran & Logistik Horeca Foods.
SP2	Ben Lian Chee Meng Pengarah Urusan Horeca Foods (M) Sdn. Bhd.
SP3	Ain Afiqah Binti Mohd Nazali (Ain) Eksekutif – Bahagian Jaminan Kualiti & Semakan Qualiti Horeca Foods.
SP4	Hooi Jai Boon (Carmen Hooi) Penolong Pengurus – Bahagian Jualan Teknikal Horeca Foods (M).

SP5	Go Mui Hoon (Alicia Go) Penolong Pengurus – Bahagian Kewangan & Pentadbiran Horeca Foods.

Defendant's witnesses

SD1	Leong Kin Ho (Kenny) Pengurus – O&G Transport (Klang)
SD2	Muhammad Mahfuz Bin Mohamad Yassim (Defendan Pertama) Pemandu Lori – O&G Transport (Klang)
SD3	Tey Lar Lim @ Tey Joo Lim Pengarah Syarikat – O&G Transport (Klang)

[11] The following are the witness statements and exhibits that were tendered and marked as evidence during the trial:-

Pernyataan Saksi Norlida Binti Zainal Abidin (Ida)	**WS-SP1**
Pernyataan Saksi Ben Lian Chee Meng	**WS-SP2**
Pernyataan Saksi Ain Afiqah Binti Mohd Nazali (Ain)	**WS-SP3**
Pernyataan Saksi Hooi Jai Boon (Carmen Hooi)	**WS-SP4**
Pernyataan Saksi Go Mui Hoon (Alicia Go)	**WS-SP5**
Pernyataan Saksi Leong Kin Ho (Kenny)	**WS-SD1**
Pernyataan Saksi Muhammad Mahfuz Bin Mohamad Yassim (Defendan Pertama)	**WS-SD2**
Pernyataan Saksi Tey Lar Lim @ Tey Joo Lim	**WS-SD3**

Delivery Order Horeca Foods-Julie [p.46 @IDB] "Outgoing Delivery Check In" "Cleanliness of Vehicle" Driver Signature	**P1** **P1(A)** **P1(B)** **P1(C)**
Invoice Horeca Foods-Julies [p.47@IDB]	**P2**
Non Conformance Report [p.57-62@IDB]	**P3**
Quotation O&G Transport – Horeca [p.65@IDB]	**IDD4**
Emel Aduan Julie kepada Horeca [p.49-50@IDB] Nama Penerima "Carmen"	**ID5** **P5A**
Ballantyne Product Specification (Parmesan Cheese Powder) [p.43@IDB]	**ID6(A)**
Ballantyne Certificate of Analysis [p.43A@IDB]	**ID6(B)**
Emel Julies Kepada Horeca Food [p.63@IDB] Alamat Emel Penerima "Carmen"	**ID7** **P7A**
4 Keping Gambar Pemeriksaan Bersama pada 11.11.2019 [p.53-56@IDB]	**P8(A), (B), (C) & (D)**
CV Ain Afiqah Binti Mohd Nazali (SP3)	**P9**
Tangkapan Skrin Komunikasi Whatsapp [p.48@IDB]	**P10**
Surat Julie (Requirement on Cleanliness & Food Safety) [p.42@IBD]	**P11**
K1 Chit [p.44@IDB]	**P12(A)**

Resit Rasmi Jabatan Kastam Diraja Malaysia [p.46@IDB]	**P12(B)**
Credit Note Horeca Foods kepada Julie's [p.52@IDB]	**P13**
Gambar-Gambar [m/s1-4,@IDT Def]	**IDD14**
Surat Jaminan O&G Transport (Transport Declaration) 14.02.19 [p.9@IDB]	**D15**
Surat Jaminan O&G Transport (Transport Declaration) 01.07.19 [p.10@IDB]	**D16**
Invoice O&G Transport 05.11.19 [p.29@IDB]	**D17**
Laporan Polis Muhammad Mahfuz Bin Mohamad Yassim	**D18**
Supplier Return Note daripada Julie	**D19**

B. ISSUES TO BE TRIED

[12] The agreed issues to be tried filed via enclosure 28-Isu-isu untuk dibicarakan are as listed below:

a) *Sama ada Defendan-Defendan telah secara bersesama dan berasingan* ***memungkiri dan/atau gagal mematuhi terma-terma dalam jaminan bertulis*** *yang diberikan?*

b) *Sama ada Defendan-Defendan telah secara bersesama dan berasingan* ***gagal, cuai dan/atau abai untuk melaksanakan usaha beijaga-Jaga*** *sebagai syarikat pengangkutan dan logistik dengan cara yang boleh dipraktikan dan munasabah untuk dilaksanakan semasa membuat penghantaran barangan Plaintif?*

c) *Sama ada Defendan **Kedua adalah bertanggungan secara vikarius** terhadap tindakan dan/atau peninggalan Defendan Pertama semasa membuat penghantaran barangan Plaintif?*

d) *Sama ada tindakan kemungkiran dan/atau peninggalan Defendan-Defendan semasa membuat penghantaran telah **menyebabkan** barangan Plaintif (112 kantung serbuk keju parmesan) tercemar dan tidak selamat dan/atau tidak sesuai untuk kegunaan sebagai produk makanan.*

e) *Sama ada Plaintif **berhak kepada gantirugi-gantirugi** yang dituntut?*

[13] Below are additional issues to be tried raised by the Defendant:

a) *Samada kontrak di antara Plaintifdan Defendan merupakan "cash sale" di mana segala risiko dan perbelanjaan kastam, pelanggaran undang-undang kemalangan dalam apa cara Jua pun adalah tanggungjawab Piaintif di mana Plaintif perlu membeli insuran untuk melindungi harga barang-barang yang di angkut oleh Defendan Kedua untuk Plaintif.*

b) *Samada Plaintif adalah cuai dan salah sendiri terhadap kemalangan tersebut apabila mengingkari kewajipan berjaga-jaga dan tanggungjawab Plaintif yang dikehendaki di dalam urusan penggangkutan barang-barang komersial.*

c) *Samada adakah benar bahawa 112 bungkusan serbuk keju parmesan tersebut ada rosak dan langsung tidak boleh digunakan atau hanya 33 bungkusan yang benar-benar rosak dan tidak boleh digunakan.*

d) Samada Plaintif telah menuntut gantirugi khas terhadap Defendan secara munasabah dan berdasarkan harga, peniiaan dan penaksiran barang-barang tersebut secara tulen, adil dan saksama mengikut kos dan harga pasaran.

e) Sama ada keseluruhan fakta-fakta di dalam kes ini, adakah Defendan liable kepada Plaintif secara penuh atau sebaliknya.

C. DEFENDANT'S DEFENCE

[14] After reading parties' submission, I found that the main thrust of Defendant's submission is that there is no proof that all the 112 bags of goods were rejected as the customer, Julie Manufacturing Sdn Bhd was not called to give evidence. Further, based on the P3 at page 61, ie the Plaintiff's own report, only 35 parcel were damaged. Defendant averred that the rest of the parcels were not sent for testing to prove that that the food products were no longer consumable at that stage. Defendant further argued that the cost for the product is only RM78,000 and there is no proof that the damages suffered was RM119,000. It was argued that Plaintiff failed to prove that they had paid for these imported goods from Australia. It was further contended by the learned counsel for the Defendant that Plaintiff should have purchased insurance for their own goods particularly when the loaded goods are perishable products. Defendant also alleged that the plaintiff shall be held responsible for not taking precautionary steps to instruct for the use of canvas during the trip. The Defendant further contented that they have been denied the right to do sampling of goods despite repeated requests.

D. PLAINTIFF'S CASE

[15] Learned counsel for the Plaintiff informed the court that they filed the suit against the Defendant grounded on the cause of action for breach of guarantee letter given by the second Defendant and negligence.

[16] Plaintiff informed the court that prior to this transportation trip, the Plaintiff had been using the Defendant's transportation service. In this regard, the second Defendant Company accordingly has issued two Guarantee letters to the Plaintiff, in the Guarantee letters, among others, Defendant made some declarations that that the vehicle used for transporting goods from the Plaintiff company would be covered with appropriate canvas and suitable for the purpose of carrying food products.

[17] The Defendant further guaranteed through their transport declaration letter that the goods from the Plaintiff will be carried under hygienic condition and be dry and clean at all times. However, Plaintiff claimed that the Defendant had breached the terms and caused damage to the food products.

[18] Plaintiff informed the court that they received confirmation from the customer Julia Manufacturing Sdn Bhd that all the goods were rejected, hence all the goods were transported back to Plaintiff's place and were kept at the Plaintiff's store.

[19] Plaintiff referred to **s. 101 and s. 104** of the **Contracts Act 1950** *(Act 136)* and argued that the Defendants should be considered as bailee under the circumstance and hence should take good care of the goods bailed to him.

[20] For ease of reference, **s. 101 and s. 104** of the **Contracts Act 1950** are reproduced below:

S. 101

"Bailment", "bailor" and "bailee"

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

S. 104

"Care to be taken by bailee

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed."

[21] Plaintiff further relied on various case including *Port Swettenham Authority v. Tw Wu and Co (m) Sdn Bhd* [1987] 2 MLJ 137, PC; *Malayan Thread & Co Sdn Bhd v. Oyama Shipping Line Ltd* [1973] 1 MLJ 121; *Port Swettenham Authority v. The Borneo Co (Malaysia) Sdn Bhd* [1975] 2 MLJ 80 FC; *Lembaga Pelabohan Swettenham v. Syarikat Hiap Bee* [1975] 2 MLJ 81, FC; *Rothmans of Pall Mall (m) Bhd v. Neo Kim Har* [1988] 3 MLJ 478 to conclude that a private carrier of goods is a bailee.

[22] On the same score, learned counsel for the Plaintiff also placed their reference to the case of *Jemeh Insurance Corp Sdn Bhd v. Hai Heng Enterprise Sdn Bhd* [2002] 4 AMR 4199; [2002] 4 MLJ 332 which highlighted the principle that a private carrier is under a duty to exercise due care and diligence as a bailee for reward.

[23] Regarding the taking of sample issues, Plaintiff argued that on the 11.11.2019 and 8.1.2020, joint inspection were done and

during the court proceeding, parties had agreed and arranged for a site visit again.

[24] Plaintiff submitted that the Defendants should be held liable for whatever losses resulted from their negligence and breach.

E. FINDING AND ANALYSIS OF COURT

[25] I do not have the benefit of hearing and seeing the witnesses at the trial. The presiding judge did not manage to deliver her decision and was then appointed as judicial commissioner. Thereafter the case had been assigned to another court for decision but no decision was made in the period of about 8 months. This court was then directed to take over the case in June 2023. None of the parties applied for the case to be heard denovo. Considering that this court does not have the audio-visual advantage of the witnesses, this court directed the case to be fixed for oral submissions and clarification purpose, if any.

[26] Having perused the notes of proceedings and the written submissions of parties, this court finds that the Plaintiff has proved its case on a balance of probabilities based on the following reasons:

a) by virtue of the appointment as the transport company to deliver goods for the Plaintiff and the Transport Declaration Letter (D15 and D16) given, through which the Defendant declared that they will ensure that food will be delivered under clean and good condition, the Defendants continued to be engaged to provide transport services to the Plaintiff in regard of food items. As such there is a contractual relationship between the parties.

[27] SD1's evidence during examination-in chief (see Notes of Proceeding dated **16.08.22)** confirmed the above:

S : Soalan 11. Rujuk muka surat 9 dan 10 Ikatan Dokumen Bersama. Boleh sahkan bahawa dokumen ini dikeluarkan oleh syarikat kamu?

J : Ya, betul

Mah : Muka surat 9 sebagai **D-15** dan muka surat 10 **D-16**

SDTs evidence during cross-examination (see Notes of Proceeding dated **16.08.22)**

S : Rujuk kepada Letter of Guarantee muka surat 9. Boleh beritahu sama ada kamu faham kandungan dalam surat ini?

J : Faham

S : Dalam surat itu ada kata we guarantee back. Maksudnya O&G ada bagi jaminan, setuju tidak?

J : Jaminan kena tengok apa. Tidak clarify yang sepenuhnya

S : Sini ada tulis we guarantee. Setuju O&G ada bagi jaminan?

J : Ya

S : Boleh terangkan maksud dalam A itu?

J : Itu lori dalam bersih dengan apa-apa tidak ada asid punya barang dalam lori yang sama.

S : D itu, boleh terangkan apa?

J : Lori pun ada canvas untuk cover

S : Setuju saya katakan dalam surat ini O&G ada bagi jaminan kata lori yang pakai akan bersih, tidak ada apa-apa barang kotor, dan ada cover canvas. Ini O&G ada guarantee?

J : Ya

S : Boleh sahkan nama dan tandatangan kamu?
J : Boleh

S : Muka surat 10, tadi juga kamu ada sahkan. Setuju kandungan ini pun sama, lebih kurang sama dengan tadi, kena bersih, kena ada canvas?
J : Ya

S : Dan sesuai untuk barangan makanan?
J : Ya

S : Ini jaminan yang O&G bagi, betul?
J : Ya

b) There was a contractual duty of care owed by the Defendants towards the Plaintiff, be it the first Defendant who is the lorry driver or the Second Defendant as the transport company.

[28] Based on SPTs evidence in **WS-SP1,** the second Defendant had been appointed as the Plaintiff's "Third Party Transport" since 14.2.2019. Pursuant to this appointment, a few declarations had been made and provided by the second Defendant to ensure that the conditions of the vehicle can meet the requirements set by the Plaintiff's customer from time to time (see **P11 - *Julie's Requirements on Cleanliness and Food Safety*** at **page 42** of the **Common Bundle of Documents Part C.**

[29] SP1 had booked the service of second Defendant for the purpose of transporting some food products to their customer in Malacca via email dated 4.11.2019. see this email at **page 7** of the **Common Bundle of Documents Part A.**

[30] Thereafter, the second Defendant replied via email dated 5 November 2019 and agreed to transport the goods by providing details of transportation/ vehicle - *(AAX257/ +0122469680)*. see

this email at **page 6** of the **Common Bundle of Documents Part A.**

[31] An invoice dated 6.11.2019 indicated transport charges of RM 440 was later issued to the Plaintiff. See **D17** at **page 29** of the **Common Bundle of Documents Part B.**

[32] Based on the **Transport Declaration letter D15** and **D16,** the Second Defendant had agreed to provide transportation service to the Plaintiff under the guarantee that:

See D15

"a. The transport/vehicles used are clean, dry, no leakage, free from pest, toxic chemical non-food materials and non-halal materials during load and transport your goods.

b. The transport/vehicles covered with appropriate canvas."

See D16

"

a. Suitable for transporting food products.
b. Clean, dry, no leakage, free from pest, toxic chemical, non-food materials and non-halal materials during load and transport your goods.
c. Free from evidence of rodents, insects, birds, dirt, rust and scale oil, grease, visible mold, metal, glass, rigid plastic, objectionable odors, toxic chemical residues, cleaning material residues and all types of foreign material.
d. Be dry and clean at all times.
e. The following parts are in good repair condition at all times:
    (i) fuel and storage tanks
    (ii) correct tyre pressure regularly
    (iii) battery's life

(iv) radiator, belts and cooling system

f. Driver are advice to wear proper foot wear. Slippers are strictly disallowed."

[33] Court of Appeal in the case of *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653 held that:-

> *"It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority, his principal is jointly and severally liable with him"*

[34] In this case, it is not in dispute that the first Defendant is an employee of the Second Defendant. How an employer can be found liable for wrongful action or conducts of his employee is best illustrated in the Court of Appeal case of *Zulkiply bin Taib & Anor v. Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607, at page 625 it was held that:-

> *"The above discussion may be summarized by stating that the common law requirement, which states that "an employee should* ***act within the scope of his employment" to*** *find* ***his*** *employer vicariously liable, has Initially been interpreted by the courts in terms of the Salmond rule. An* ***employee, according to the rule, was not acting within the scope of employments, if these wrongful actions or conduct was against the employer's instruction or interest.*** *The cases discussed above developed the standard test to include deviated actions of employees. These cases, especially the case of F v. Minister of Safety and Security (supra), formally introduced the close connection test into the common law principle of vicarious liability.*
>
> *We respectfully agree with the decisions of the above cases. In our opinion, if a* ***close connection*** *between the* ***deviated actions*** *of an employee and the* ***purpose or nature of his employment*** *is*

established by certain factual evidence, an employee maybe found to be ***acting within the scope of his employment****."*

[35] What is considered as "within the scope of his employment" was further discussed in the case of *Zakaria Bin Che Soh v. Chooi Kum Loong & Anor* [1985] 1 MLRH 370, it was held that:

"In arriving at this conclusion, I have applied the principle that ***an act though strictly not one which an employee is required by his employment to perform is still to be regarded as within the sphere of his employment if it is a reasonable or necessary thing to do under all the circumstances unless it has been expressly or impliedly excluded from his employment. The test is whether the manner of doing the act was not so far remote from anything contemplated by either party as to take the act out of the employment: Pepper v. Sayer.*** *(10)"*

[36] The principle of law regarding vicarious liability was laid down in the Privy Council case of *Goh Choon Seng v. Lim Kim Soo* [1925] ALL ER Rep.170PC which was relied upon in the case of *Foong Chee Chong v. Inpector Mohd Nasir Samsuddin & Anor* [1998] 2 MLRH 368.

"As regards all the cases which were brought to their Lordship's notice in the course of the argument this observation maybe made. They fall under one of three head: (i) The servant was using his master's time or his master's place or his master's horses, ***vehicles*** *machinery or tool for his* ***own purposes****: then the master is* ***not responsible.*** *Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (ii) and (Hi). Under (ii) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he*

may do** to a third party.* Under head ***(iii) some cases like the present where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized, had he known of it. In these cases the master is, nevertheless, responsible."

[37] Applying the third head into our case, no doubt that in the current case, the 1st Defendant was doing the delivery task of which he was assigned to do, but he had failed to take precautionary step to cover the goods properly with the canvas, further he had indeed adhered to assigned routes and time schedules given by the second Defendant to load and carry some chemical goods in the same trip too, obviously this was done with his master/second Defendant's authorisation. Under the circumstances, this court finds that the master i.e the second Defendant should be held vicariously liable.

c) Premised on this contractual obligation, there was a relationship of proximity between them, the Defendants could reasonably foresee that their failure to take reasonable care in carrying out the transporting job could cause damage to the Plaintiff.

[38] This court finds that there was a positive duty imposed by way of contract for the Defendants to act accordingly in order to prevent the Plaintiff from suffering damages.

[39] For the purpose of the general law of negligence, in **Principles of The Law of Tort in Malaysia, Malayan Law Journal Sdn Bhd, 1998, p. 42,** it is stated that:

"The developing law nevertheless has resulted in several circumstances where affirmative duty has been imposed. These circumstances may arise: first, where a person undertakes to do a job, i.e a pre-existing duty, perform a function or has induced a person to rely upon him doing so. (see for eg Barnett v.

Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428; White & Anor v. Jones & Ors [1995] 1 All ER 691)"

[40] In this case, the Defendants through **D15** and **D16** expressly made some undertakings and had induced the Plaintiff to rely upon their transportation service, hence they are under a duty to take reasonable care to the Plaintiff who is reasonably likely to be affected by their lack of care.

d) The Defendants had breached their contractual obligations towards the Plaintiff when they failed to take the following steps in transporting the goods:

i) Defendants did not cover the vehicle with canvas;

[41] **SD2** in his witness statement WSSD2 clearly admitted that he only covered the goods when a sudden downpour of heavy rain happened in the midst of his journey.

See SD2's witness statement WSSD2.

7. S: Apa jadi lepas itu?
J: Pada hari yang sama saya mendapat arahan daripada majikan saya untuk mengutip kargo lain daripada GRP Sdn Bhd. di Bandar Sultan Sulaiman Industrial Park dekat pelabuhan Utara Klang. Sebelum sampai ke premis GRP Sdn Bhd, tiba-tiba hujan lebat di kawasan sekitarnya. Saya terus memberhentikan lori dekat Highway dan menutup barang-barang dengan kanvas. Selepas itu saya terus pergi ke GRP Sdn Bhd untuk mengutip kargo.

[42] Cross examination of this witness further revealed that the canvas was half opened and that means the goods were not fully covered, see the notes of proceeding dated 16.08.22.

S : En Mahfuz soalan dan jawapan 7. Boleh En Mahfuz sahkan semasa membawa lori tersebut, canvas itu tidak tertutup?
J : Tutup separuh

S : Buka lah?
J : Buka

[43] In fact the first Defendant's practice was to only cover the loaded goods with full canvas when the lorry is fully-loaded. See his evidence during cross - examination at **page 35 SD2** notes of proceeding:

S : Setuju En Mahfuz sepatutnya tutup canvas semasa lori berjalan?
J : Tidak setuju sebab saya belum isi penuh.

S : En Mahfuz ada **dinasihatkan oleh En Kenny** (second Defendant's manager) tidak supaya sentiasa tutup canvas semasa lori berjalan?
J : **Tidak ada.**

S : Jadi selalu kamu tidak tutup Canvas?
J : Saya **tidak tutup habis.** Bila hendak isi **memang separuh sahaja canvas** itu.

S : Jadi bila En Mahfuz ambil apa-apa barang pun, lori semasa bergerak itu memang tidak tutup canvas melainkan iori penuh, betul?
J : Penuh dan hujan.

S : Masa hujan baru hendak tutup canvas?
J : **Bila full.**"

ii) <u>Defendants failed to ensure the goods were transported in hygienic condition;</u>

[44] Based on the **Non-Conformance Report** [Ekshibit **P3** at **page 57 – 62],** it was reported that during unloading, the goods on the pallet were wet and water vapour can be seen inside the stretch film. Ants colony were also found at the bottom of pallet. Further, it was found that mould grow on the packaging as well. Photographs were taken and attached in the report to show the condition of the goods.

[45] The above conditions indicated that the cleanliness of the transport vehicle is highly in issue and the Defendant had therefore breached their undertaking to ensure that the vehicle used is clean, dry and free from pest as guaranteed before.

iii) Defendants allowed the goods to be placed together with some other chemical non-food materials i.e tong drum (see p. 32 Notes of Proceeding dated **16.08.22** - SD2's evidence during cross-examination).

Cross-examination of SD2

S : Boleh beritahu apa barang yang diambil di Cargo GRP Sdn Bhd?
J : **Tong drum**

S : Apa itu? Barang apa?
J : **Gam**

S : Adakah ia diletakkan bersama dalam lori yang sama pada hari yang sama?
J : Sama

S : Jadi hari itu En Mahfuz sahkan bahawa En Mahfuz bawa cheese powder dengan tong drum untuk hantar?
J : Aah

S : Ini untuk dihantar ke mana?
J : Melaka

[46] This court finds that **SD2** (the first Defendant) had lodged a report pursuant to his superior's instruction after the incident. In his police report **D18** at **page 30** of the **Common Bundle of document Part B,** he stated that after uploading the food products from Plaintiff, he continued to pick up some other pallet from another company. He then drove back to Malacca and only waited till the next day (6.11.2019) afternoon 3pm, he delivered the food products to the Plaintiff's customer. From his evidence in his witness statement, this court was made to understand that this witness SD2 in fact lived in Malacca and he drove from Malacca to Shah Alam to pick the food goods from the Plaintiff on 5.11.2019.

[47] This means the food goods were placed together with chemical goods for at least few hours or even overnight. Not only that this is a clear breach of the guarantee terms, this court finds that no explanation or effort have been shown by this witness that he did exercise some diligent steps to ensure that both the food products and the chemical goods were placed with sufficient safety measures to avoid contamination.

[48] Realizing that some goods must have been affected by rain (please see his answer to question 14 in his witness statement WSSD2- *"Saya percaya sebahagian daripada barang-barang tersebut terkena hujan semasa perjalanan saya ke GRP Sdn Bhd dan adalah basah sikit")*, the first Defendant also did not take any prompt action to dry the goods when he reached Malacca.

e) <u>On the facts, I find that Plaintiff had suffered loss due to the rejection of whole bunch of goods (see p. 51 and p 63 bundle B).</u>

[49] The issue here is whether the Defendant should be held liable for the value of loss calculated pertaining to the rejection of the whole bunch of goods or should only be held liable for the damaged goods.

[50] Defendant argued that based on Plaintiff's own report, only 35 bags of goods were found damaged, hence, at the most, the Plaintiff is only entitled to claim damages for this 35 bags of goods only. However, from the evidence, it can be seen that the Plaintiff's own report was prepared and issued to the second Defendant on 12.11.2019 in which the Plaintiff indicated that *"due to the wet, severely torn and mouldy condition, total 35 bags (26 bags with severe torn and wet and 9 bags found mouldy) will not be accepted by our customer*."

[51] Be that as it may, Plaintiff received an email dated 21.11.2019 from the customer Julies Manufacturing Sdn Bhd P 7A informing the following:

"Noted that several efforts have been done by you team in sorting and segregation of the wet bags. However, ***we still could not accept this batch of Parmesan Cheese due to the unacceptable condition of goods at the point of receipt and also other potential problems from wet bag.***

Please arrange with your team to ***expedite the replacement*** *at soonest possible."*

[52] Hence, based on the balance of probability test, 1 find that it is sufficient for the Plaintiff to prove that ail the goods were rejected by the intended purchaser, the Plaintiff is not required to prove that in fact all the goods were damaged and cannot be consumed or released to third party for alternative purpose.

[53] Second issue here is whether the loss should be assessed based on the cost incurred to procure the goods or the value of the goods at the destination. For this issue, it is helpful for us to refer to a few authorities below:

(i) *Sony Computer Entertainment UK Ltd v. Cinram Logistics UK Ltd* [2008] EWCA CIV 955 in which The UK Court of

Appeal ruled that *the claimant is entitled to recover the price at which he could reasonably have sold the goods and not the acquisition costs.*

"[49]** Of course, this case is not about a claim for breach of a contract of sale, but Mr Hill Smith submits nevertheless that the principle is the same, namely that the seller of stolen goods, like the seller of non-accepted goods, must prove that the prima facie loss of profit on the sale was not recouped on a further sale. In my Judgment, whether the matter is looked at in this way, by analogy with the case of the seller who sues his buyer for non-acceptance, or whether the matter is looked at more directly,* ***asking what an owner of goods has lost by reason of having his goods lost or converted by a bailee, in breach of contract, there being as in this case no problem on the ground of remoteness or lack of knowledge of the profit in question, the answer must be that prima facie the owner is entitled to the value of his goods; and that if the Defendant wishes to say that the loss is less because the profit could have been earned in any event by a substitute or replacement sale, at the cost only of the expenditure of a lesser sum for the purpose of manufacturing or buying in further goods, then the Defendant bears the burden of proving that case. It is not for the Claimant to prove a negative, that he has not recouped the profit by a substitute sale, but for the Defendant to prove a positive, that the profit has been recouped and thus the loss of profit not suffered after all.

***[50]** It seems to me that this conclusion is equally confirmed by the common ground agreement that, aside from the discount available to Game as a large and favoured customer, the market value of the lost cards was*

even greater than the amount claimed. I do not see why market value should not be a good guide to what Sony has lost, at least prima facie, even if Sony was content, and might (or might not) have been obliged, to limit itself to the profit on the sales to Game in question. See McGregor on Damages, 17th ed, 2003, at paras 27-003ff and 27-017ff. However, neither party here rested on market value, but on a choice between sale price and (an essentially) manufacturer's price."

(ii) *Attorney General Of The Republic Of Ghana (Ghana National Petroleum Corp) v. Texaco Overseas Tank Ships Ltd* [1994] C.L.C. 155, Lord Goff held that:

"It has long been established that, in claims by a goods owner against a carrier for non-delivery of the goods, the damages recoverable by the goods owner are such as will put him into the position he would have been in if the goods had been duly delivered, and are therefore the value of the goods at the time when, and the place where, they should have been delivered. *The question arises: how is that value to be ascertained? This depends on whether there is an available market for the goods in question. If there is an available market for the goods, the prima facie rule is that the value is assessed by reference to the market price on the date when the goods should have been delivered. If there is no available market, then the value of the goods at the relevant time and place has to be ascertained as best it can on the available evidence; but in cases of short delivery this Is commonly done by taking the cost price and the freight and adding to those sums a reasonable profit for the importer. However, any resale prices in fact obtained by the goods owner are not generally relevant These principles are well established by*

a long line of authority stretching back to Brandt v. Bowlby [1831] 2 B & Ad 932 at p. 937 per Lord Tenterden GJ, p. 939 per Parke and Taunton J J, and p. 940 per Patteson J. A very clear statement of the law is to be found in the judgment of Blackburn J in O'Hanlan v. Great Western Railway Co [1865] 6 B&S 484 at p. 491. But the leading case is the decision of the Court of Appeal in Rodocanachi v. Milburn [1886] 18 QBD 67, which has been applied and followed on many subsequent occasions. In that case Lord Esher MR said at pp. 76–77:

'I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? If the goods are delivered he obtains them, but in order to obtain them he must pay the freight in respect of which there is a lien on them. If there were no lien, he would be entitled to the goods without paying anything. Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff."

[54] This court is assured by the authorities above that the assessment for loss should take into account the value at destination Le the selling price to Julie is **RM 115,584.00.**

[55] Further due to the damage issue which had resulted into the rejection of all the goods, the Plaintiff had to bear the cost of SST amounting to **RM 3,907.06** for this imported goods to be paid to the Custom Department. This claim is substantiated with documentary proof as shown in **P12 (A)** & **(B)** and **Borang SST-ADM (p. 18 -19 Common Bundle of Documents part B).**

[56] In the case of *Club Coffee Co Ltd v. Moore MCCormack Lines (Canada) Ltd* [1968] 2 LLOYD'S Rep. 103 the court allowed the claim for customs duty incurred due to the negligence caused by the Defendant in the delivery of goods:

> *'By a bill of lading dated November 4, 1964, 500 bags of coffee were shipped on D's steamship at Rio de Janiero to New York or Boston. On November 18 two bills of lading were substituted by D who accepted surrender of the November 4 bill; the new bills were each for 250 bags with delivery at Montreal. Cl. 13 of the new bills provided, inter alia, that in the case of loss or damage to the goods, their value should be deemed to be certain sums, and the carrier's liability, if any, should be determined on such values. Cl. 16 provided that the bill should be construed and the rights of the parties determined according to the law of the United States of America. The vessel arrived in Montreal, and P, the holder of one of the substitute bills paid customs duty on 250 bags, but only 158 bags were delivered to him. P now sued D for the non-delivery of 92 bags.*
>
> *Held,* ***(1) that damages for non-delivery included the customs duty which the owner had become liable to pay***

> ***under Canadian law whether he received the goods or not, if, as was probable, the goods were in fact imported into Canada; (2) that the reason the damages included the duty paid on undelivered bags was that it formed part of P's loss following from P's failure to deliver;*** *(3) that after November 18 the contract was no longer for carriage to or from ports of the United States of America, so that the United States Carriage of Goods by Sea Act did not apply to the bill; and (4) that cl. 13 did not affect P's right to include in the calculation of its damages the customs duty for which it had become liable."*

[57] Based on the above authority, this court is satisfied and convinced that the Plaintiff is entitled to claim the cost of SST as this cost is a consequential loss arising from damage.

f) Defendant failed to show that reasonable care or precautionary steps have been taken to ensure that the goods can be delivered in good condition as declared. The Defendant had failed to rebut this inference of negligence by providing a plausible reason or explanation.

[58] In determining that there was a failure on the part of the Defendants to take reasonable care towards the Plaintiff, this court had considered the factual evidence adduced. It is stated in the **Laws of Torts in Singapore, Academy Publishing 2016, second edition** at **p.229** that:

"The standard of care is not rigid and may accommodate relevant circumstances in order to either modify the standard of care or render the standard more specific to the class of persons to which the defendants belongs."

[59] This court considers that the standard of care expected from a transportation company particularly one which had put up

certain undertakings and had the requisite knowledge of the nature of the goods entrusted to them is a more specific one. The Defendants are required to show that not only that they had taken all the reasonable precautionary steps to meet the standard of care expected in the logistic field, but also must show that they had taken all the reasonable preventive steps to ensure that they can comply with the threshold standard guaranteed by them as shown in D15 and D16.

[60] This court finds that despite being aware of the fact that the goods involved are perishable food products, the first Defendant did not bother to cover the goods with full canvas immediately after uploading the goods. The second Defendant being the employer of the first Defendant had wilfully breached their undertaking when instruction was given to the first Defendant for him to pick up some chemical goods to be transported in the same trip. In the circumstances, this court held that the Defendants breached their duty of care to the Plaintiff.

g) Issue whether Plaintiff did purchase insurance for the transported goods has no bearing in Defendants' case as this would not absolve the Defendants from their duty to discharge the burden of proving reasonable care have been exercised on the part of the Defendants.

h) Issue regarding sampling of goods has been adjudicated before and since the Defendant did not file further appeal against the decision of High Court, the same issue should not be re-litigated. This court is of the considered view that the Defendant is now estopped from advancing the same argument which now has become res judicata as that point of defence has been adjudicated by the trial court and the high court, see *MGI Securities Sdn Bhd v. Teong Teck Leng & Ors* [2000] 1 MLJ 354, 358 wherein the court held that:

"The court upon hearing the solicitors submissions, made a finding that as the appellants had withdrawn their appeal on a finding of the senior assistant registrar to the effect that the defence was a specific defence without any clear admission on the part of the defendant; the plaintiffs are now *estopped* from adducing or advancing the same argument to contradict that decision which has now become res judicata; as that point of defence has been adjudicated by the court; and the parties by withdrawing the appeal on that point are now not permitted to relitigate as per his Lordship Dato' Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Reliti Sdn Bhd* [1995] 3 MLJ 189."

[61] Further, this court is satisfied that there is no necessity for a sampling to be done for contamination test and this court is of the considered view that visual examination alone is sufficient to determine whether the food products were still safe for consumption purpose.

[62] Based on the evidence given by **SP3** who was also the executive from *"Bahagian Jaminan Kualiti & Semakan Qualiti Horeca Foods* i.e the QAQC Assistant Manager for the Plaintiff." (see **P9** the CV of this witness for her qualification in food industry), this court took cognizance of the importance in safeguarding the consumers interest in food industry and there is no need to carry out a further test if by visual inspection, we are able to infer high risk of contamination based on the conditions of the foods product during inspection.

[63] This court is satisfied that the Plaintiff had adduce sufficient cogent facts for this court to make a rational assumption that the whole batch of food products are no longer safe to be distributed or sold to others for consumption purpose.

See evidence of SP3 during re-examination in Notes of proceeding dated 30.6.2022

S : Tadi Cik Ain ada ditanya berkenaan satu soalan yang ada kemungkinan cheese tersebut akan rosak dalam 6 hari tetapi Cik Ain ada sebutkan jawapan tidak akan rosak jika tidak ada apa-apa faktoryang merosakkan. Boleh jelaskan apa maksud Cik Ainfaktor-faktor yang merosakkan?

J : Disebabkan barang parmesan cheese itu adalah barang yang perishable jadinya sekiranya ada faktor lain seperti basah atau ada pencemaran lain, barang itu akan rosak.

S : Tadi CikAin ada juga ditanyakan berkenaan pemeriksaan pada 11 November dan Cik Ain telah maklumkan pemeriksaan secara fizikal dibuat di luar. Boleh terangkan ada apa-apa sebab kenapa pemeriksaan dibuat di luar dan bukan di dalam?

J : Pertama sekali, disebabkan dengan jelasnya kita ada Nampak **pencemaran fizikal iaitu dengan kehadiran semut** dan jadi sebab itu lah kita tidak bawa barang tersebut masuk ke dalam kilang kita kerana kita tidak hendak pencemaran semut itu masuk ke dalam kilang.

S : Tadi Cik Ain dirujuk kepada aduan Julie’s di muka surat 48 dan 49 dan peguam ada mengatakan masih terdapat plastic wrapping, so basah tersebut hanya secara luaran sahaja dan Puan ada rujuk pada muka surat 50, Puan tidak setuju dan ada rujuk muka surat 50. Boleh terangkan kenapa Cik Ain tidak setuju yang ia bukan basah secara luaran sahaja?

J : Kerana daripada gambar di muka surat 50 itu sebab terdapat perbezaan warna beg pembungkus itu. Jadi boleh nampak yang di **daiamnya juga basah, di beg itu juga basah**

S : Cik Ain ada ditanyakan berkenaan ambil sample buat moisture analysis dan Puan ada kata juga prosedur kebiasaan sample untuk satu pallet akan diambil 2 beg untuk buat sample tetapi sebab kes ini ada ambil tambahan 2 beg lagi. Boleh terangkan apa maksud Puan?

J : Disebabkan keadaan itu yang **sudah terlalu teruk** pada pandangan saya QAQC, jadi untuk **memastikan lagi keadaan** cheese powder tersebut, saya **menambah lagi 2 beg.**

S : Tadi pun ada banyak ditanyakan soalan berkenaan crosscontamination dan Puan ada jawab yang Puan tidak dapat pastikan mana ada tercemar, mana tidak tetapi Puan meragui beg lain tiada kontaminasi. Boleh terangkan apa maksud meragui beg lain tiada kontaminasi?

J : Apa maksud saya ialah saya meragui beg iain itu terdapat kontaminasi. Terdapat **cross contamination dari beg yang kotor** tadi, **beg yang basah danjuga berkulatdan bersemuttadi.** Maksud saya adalah itu

S : Meragui apa?

J : Meragui beg yang lain itu terdapat kontaminasi

S : Yang tidak dapat dipastikan itu?

J : Ya

S : Tadi Cik Ain ditanyakan soalan Cik Ain tidak ambil sample untukkontaminasi. Boleh terangkan **kenapa tidak ambil sample untuk check kontaminasi?**

J : Untuk itu sebab dengan keadaan beg yang basah tersebut, kita mengambil langkah untuktidak mengambil sample itu kerana kita pun ada merujuk kepada **Akta Food Act 1983** di sini dengan Act 13A ada menyatakan. 13A(3) ada juga menyatakan. Jadi kita mengambil langkah untuk tidak menghantarnya untuk test sebab tidak dapat dipastikan lagi kontaminasi **dalam** itu

S : Cik Ain ada juga ditanyakan tentang quality control apabila barangan ini daripada pembekal. Cik Ain tidak akan menjalankan pemeriksaan sendiri. Boleh jelaskan ada apa-apa sebab tidak?

J : Ini kerana kita tidak meletakkan dengan prosedur yang kita ada kita hanya membuat pemeriksaan terhadap barangan itu secara visual, secara mata sahaja dan itu adalah prosedur kita

S : Peguam tadi ada cadangkan memandangkan Cik Ain hanya buat pemeriksaan visual, ada cadangkan barang ini sepatutnya dihantar ke makmal untuk diperiksa dan Cik Ain tidak setuju. Boleh terangkan kenapa tidak setuju bahawa barang ini perlu dihantar ke makmal untuk diperiksa?

J : **Kerana keadaan beg yang telah sangat teruk. Jadi tidak perlu lagi untuk diperiksa.**

S : Tadi peguam juga ada katakan bahawa baki 77 beg tersebut **masih boleh digunakan kalau keluarkan setiap beg dan masih boleh diproses untuk**

makanan. Cik Ain kata tidak setuju. Boleh terangkan kenapa tidak setuju?

J : Ini disebabkan beg di luar itu **yang telah dikontaminasi dengan mould di mana terdapat kontaminasi bahan microbiology dan juga semut. Jadi saya tidak setuju dengan penyataan** itu

S : Peguam juga ada katakan bahawa Julie's tidak mempunyai asas untuk menolak barangan tersebut dan Horeca tidak patut ambil balik barangan cheese tersebut dan Cik Ain ada jawab tidak setuju. Boleh terangkan kenapa tidak setuju?

J : Ini disebabkan dari aspek QAQC itu sendiri, untuk bahan makanan apa sahaja yang kita terima kita **kena pastikan kesemua beg yang kita terima dalam keadaan baik dan tidak menjejaskan ataupun tidak ada kemungkinan untuk berlakunya pencemaran**

S : Peguam juga ada katakan sekiranya ada sample dihantar ke makmal di luar, ianya masih boleh dipakai dan Cik Ain kata tidak setuju. Boleh terangkan kenapa?

J : Disebabkan terdapat **kontaminasi yang di <u>luar</u> beg** itu. Jadi keputusan pemeriksaan itu memang tidak boleh digunakan lagi. Barang itu tidak boleh digunakan lagi

S : Peguam ada kata 77 baki bungkusan tersebut tidak basah dan kalau ia diperiksa ia masih boleh digunakan. Cik Ain pun kata tidak setuju. Boleh terangkan kenapa tidak setuju?

J : Sebab di **luar bungkusan itu terdapat kontaminasi bahan-bahan yang tidak sepatutnya dan ini boleh menjejaskan keselamatan makanan**

S : Boleh Cik Ain terangkan dengan lebih lanjut sama ada apakah asas Cik Ain untuk buat penerangan macam tadi? Ada apa-apa polisi ke, undang-undang ke?

J : Di dalam industry makanan ini, kita ada **pencemaran biologi, pencemaran fizikal dan pencemaran chemical.** Di sini apa yang kita dapat adalah kehadiran mould adalah **pencemaran biological.** Pencemaran biological boleh menyebabkan ataupun memberikan kesan kepada pelanggan yang menggunakan produk itu. Jadi sama ada dia memberikan kesan-kesan keracunan makanan atau sebagainya

S : Tadi peguam juga ada katakan bahawa setelah 77 beg tersebut dikeluarkan dan diproses masih boleh digunakan dan faktor keselamatan tidak menjadi isu. Cik Ain tidak setuju. Boleh terangkan kenapa Cik Ain tidak setuju?

J : Sebagai **pengeluar makanan, faktor keselamatan** adalah perkara yang sangat-sangat dititikberatkan untuk menjamin keselamatan pengguna. Jadi memang **keselamatan makanan** itu satu faktor yang kita ambil berat.

i) This court further finds that there is no obligation on the part of the Plaintiff to find a third party buyer or prove that the food products is still consumable and show the effort to so called "mitigate the loss" by reselling the products to another party or

sought alternative use for those rejected food products. When the goods are clearly rejected due to the negligence of the carrier, the carrier should be held liable, see *Dick v. East Coast Railways* [1901] 4 F 178, Ct of Sess -*where goods are so badly injured in transit as not to be easily repaired, the owner may reject them, and the carrier is liable for their fail value"*

[64] To my mind, it is perfectly fine and most prudent for the plaintiff to abide themselves with the do's and don't s which are clearly enshrined in our current food law below:

FOOD ACT 1983

"13. Food containing substances injurious to health

*(1) Any person who **prepares or sells any** food that has in or upon it any substance which is **poisonous, harmful or otherwise injurious to health** commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.*

*(2) In determining whether any food is injurious to health for the purpose of **subsection (1), regard shall be had not only to the probable effect of that** food on the health of a person consuming it but also to the probable **cumulative effect of the food** of substantially the same composition on the health of a person consuming the food in ordinary quantities.*

13A. Food unfit for human consumption

*(3) Any person who **prepares or sells any food that contains or** upon which there is **any matter foreign to the nature of such food, or is otherwise unfit for human consumption,** whether manufactured or not, commits an offence and*

shall be liable, on conviction, to a fine not exceeding thirty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(4) *Any person who* ***prepares or sells any food*** *whether manufactured or not that is* ***enclosed in a sealed package and the package is damaged and can no longer ensure protection to its contents from contamination or*** *deterioration, commits an offence and shall be liable, on conviction, to a fine not exceeding thirty thousand ringgit or to imprisonment for a term not exceeding five years or to both.*

13C. Removal of food from food premises

(1) *Where any food is found to have contravened or reasonably suspected to have contravened any provision of this Act or any regulations made under this Act, the Director or any authorized officer authorized by the Director may, by notice in writing, order any of the persons in section 24 to recall, remove, or withdraw from sale such food from any food premises within such time as may be specified in the notice.*

(2) *Notwithstanding subsection (1), it* ***shall be the duty of any of the persons*** *in section 24, if he knows or has reason to believe or it has come to his knowledge that any food imported, manufactured, packed, farmed, prepared or sold by him has contravened section 13, 13A or 13B,* ***to recall, remove or withdraw from sale such food from any food premises with immediate effect.***

(3) *A person who contravenes subsection (1) or (2) commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand ringgit or to*

imprisonment for a term not exceeding ten years or to both.

14. Prohibition against sale of food not of the nature, substance or quality demanded

(1) Any person who ***sells any food which is not of the nature, or is not of the substance, or is not of the quality (as*** *specified under this Act and any regulation made thereunder) of the food demanded by the purchaser, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years or to fine or to both.*

(2) Where regulations made under this Act contain provisions prescribing the standard of any food or the composition of or prohibiting or restricting the addition of, any substance to any food, a purchaser of the food shall, unless the contrary be proved, be deemed for the purpose of this section to have demanded food complying with the provisions of such regulations."

F. CONCLUSION

[65] Accordingly for reasons summarised below, this court finds that the Plaintiff has proved its case on a balance of probabilities and the Defendant failed to tender cogent evidence to disprove the Plaintiff's claims or to prove its defence:

a) by virtue of the appointment as the transport company to deliver goods for the Plaintiff and the Transport Declaration Letter (D15 and D16) given, through which the Defendant declared that they will ensure that food will be delivered under clean and good condition, the Defendants continued to be engaged to provide transport

services to the Plaintiff in regard of food items. As such there is a contractual relationship between the parties.

b) there was a contractual duty of care owed by the Defendants towards the Plaintiff, be it the first Defendant who is the lorry driver or the Second Defendant as the transport company.

c) Premised on this contractual obligation, there was a relationship of proximity between them, the Defendants could reasonably foresee that their failure to take reasonable care in carrying out the transporting job could cause damage to the Plaintiff.

d) The Defendants had breached their contractual obligations towards the Plaintiff when they failed to take the following steps in transporting the goods: i) Defendants did not cover the vehicle with canvas; ii) Defendants failed to ensure the goods were transported in hygienic condition; iii) Defendants allowed the goods to be placed together with some other chemical non-food materials i.e tong drum (see **page 32 SD2**'s evidence during cross-examination).

e) On the facts, I find that Plaintiff had suffered loss due to the rejection of whole bunch of goods (see p. 51 and p 63 bundle B). I also find that on the balance of probability test, it is sufficient for the Plaintiff to prove that all the goods were rejected by the intended purchaser, the Plaintiff is not required to prove that in fact all the goods were damaged and cannot be consumed or released to third party for alternative purpose.

f) Defendant failed to show that reasonable care or precautionary steps have been taken to ensure that the goods can be delivered in good condition as declared. The

Defendant had failed to rebut this inference of negligence by providing a plausible reason or explanation.

g) Issue whether Plaintiff did purchase insurance for the transported goods has no bearing in Defendants' case as this would not absolve the Defendants from their duty to discharge the burden of proving reasonable care have been exercised on the part of the Defendants.

h) Issue regarding sampling of goods has been adjudicated before and since the Defendant did not file further appeal against the decision of High Court, the same issue should not be re-litigated.

[66] Premised on the above, the Plaintiff's claim for special damages of **RM119,491.06** (selling price of **RIW 115,584.00 +** cost of SST **RM 3907.06)** is allowed.

[67] For general damages, since the Defendants never agreed to dispense with formal and proper proof of other losses, in my opinion, the Plaintiff must adduce cogent evidence to prove other losses suffered. The evidence given by **SP5** in her answer to question **21 – 23** in **WSSP5** are merely an estimate and no supportive evidence was tendered to show the loss in fact incurred upon the Plaintiff and indeed paid by the Plaintiff in this respect. In that regard, a nominal general damages of RM2000 is granted.

[68] The court accordingly allowed the interest as prayed in paragraph 31 (c) and (d) of the plaintiff's statement of claim.

[69] Cost of this action is fixed at the amount of RM13,000 payable to the Plaintiff.

Dated: 20 OCTOBER 2023

(YONG LEOU SHIN)
Judge
Session Court
Shah Alam Selangor

Counsel:

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Kuala Lumpur

For the defendants - Ivan Ho; T/N HO DAN RAKAN RAKAN
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